IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BRUCE BANCROFT,	:	CIVIL ACTION
	:	NO. 04-3281
Petitioner,	:	
	:	CRIMINAL ACTION
v.	:	NO. 01-665
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. November 1, 2005

Robert Bruce Bancroft has filed for habeas relief pursuant to 28 U.S.C. § 2255 collaterally attacking his sentence and asking this Court to vacate, set aside or correct his sentence. He presents three arguments: (1) an alleged breach of the plea agreement by the government for failing to support its own 18 U.S.C. § 3553(e) motion for a downward departure; (2) ineffective assistance of counsel; and (3) the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), prevents this Court's enhancement of his sentence without a jury. For the following reasons, petitioner's motion is denied.

I. BACKGROUND

Bancroft pleaded guilty to conspiracy with intent to

distribute more than 50 grams of methamphetamine in violation of 21 U.S.C. § 846 and distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1). Bancroft was sentenced by this Court to a total of 228 months imprisonment, 8 years supervised release, a $1000 fine and a $200 special assessment. This Court granted a § 5K1.1 motion for a downward departure under he guidelines, but denied a § 3553(e) motion for a downward departure from the statutory mandatory minimum of ten years imprisonment. His co-defendant, Paul Ziglio, was sentenced to 41 months imprisonment. The sentencing disparity was result of Bancroft's extensive criminal history.

II. ANALYSIS

Section 2255 allows a prisoner in custody to attack his sentence if it was imposed in violation of the Constitution or statute, the court lacked jurisdiction to impose it, it exceeds the maximum allowed by law, or it is otherwise subject to collateral attack.[1] See 28 U.S.C. § 2255. The petitioner is entitled to an evidentiary haring as to the merits of his claim unless it is clear from the record that the prisoner is not

[1]Section 2255 also has a one-year statute of limitations that requires the petition to be filed within one-year of the date on which defendant's conviction became final. See 28 U.S.C. § 2255. Bancroft's petition was timely filed on July 17, 2004 as his conviction became final on December 8, 2003 upon denial of certiorari by the United States Supreme Court.

entitled to relief. See United States v. Victor, 878 F.2d 101, 103 (3d Cir. 1989). Here, Bancroft is not entitled to relief based on the record and his § 2255 petition to vacate, set aside or correct his sentence should be denied for the following reasons.

A. Breach of the Plea Agreement.

Bancroft argues that the government breached the plea agreement by failing to make the extent of his cooperation known to the court when the government filed the § 3553(e) motion for a downward departure from the mandatory minimum. The government filed the § 3553(e) motion and a § 5K1.1 motion under the Sentencing Guidelines, both of which allow the sentencing court to depart from the mandatory minimum and the guideline range, respectively. At sentencing, however, the government recommended that the court depart from the guideline range, but not below the mandatory minimum because of the defendant's criminal background and recidivism. It is that failure to argue in support of its own § 3553(e) motion that the defendant argues was a breach of the plea agreement that entitles him to relief.

The Third Circuit addressed this issue on Bancroft's direct appeal. See United States v. Bancroft, 68 Fed. Appx. 312 (3d Cir. 2003). There, the court focused on the language in the agreement requiring the government to file the motion and found that the government had not breached the plea agreement. The

rationale was that once the government filed the § 3553(e) motion to allow the court to depart from the mandatory minimum, the government had fulfilled its duty under the plea agreement. "The government was permitted to make any argument it wished once it fulfilled its obligation to file the bargained-for motions." See id. at 313 (citing United States v. Medford, 194 F.3d 419, 423 (3d Cir. 1999) (deciding same issue with regards to § 5K1.1 motion under the guidelines)). Moreover, there was no bad faith by the government because the government's conduct at sentencing comported with the plea agreement. This Court need not address this issue because it was already adjudicated on direct appeal. See United States v. Lawton, No. 01-630, 2005 U.S. Dist. LEXIS 6123, at * 10 (E.D. Pa. Mar. 21, 2005) ("Section 2255 generally 'may not be employed to relitigate questions which were raised and considered on direct appeal.'" (quoting United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993))).

B. Ineffective Assistance of Counsel.

Defendant also argues that his sentence should be corrected for ineffective assistance of counsel during plea bargaining and sentencing because his lawyer (1) said he would receive a sentence below the mandatory minimum if he pleaded guilty, (2) did not object to discrepancies in the Presentence Investigation report ("PSI") and (3) advised him that any objections to the PSI might have aggravated the terms of the plea

agreement. To succeed on an ineffective assistance of counsel claim, Bancroft must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's mistakes, the result of the proceeding at issue would have been different. See Victor, 878 F.2d at 103 (citing Strickland v. Washington, 466 U.S. 668, 687-96 (1984)). In guilty plea cases specifically, the second prong of Strickland "requires that the petitioner show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." See Powell v. United States, No. 03-3754, 2004 U.S. Dist. LEXIS 12964, at *5-6 (E.D. Pa. July 1, 2004) (Robreno, J.) (citing Parry v. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995)).

The reasonableness of counsel's actions here need not be addressed because Bancroft has failed to make a showing of prejudice under the second prong of Strickland. The only allegation of prejudice lies in a bald statement: "why would I plea bargain for a 19 year sentence?" See Mot. to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, at 7 (doc. no. 65). A § 2255 petitioner must make more than a bald assertion that he would not have entered a plea of guilty absent the alleged errors by counsel. See Powell, 2004 U.S. Dist. LEXIS 12964, at *6.

Moreover, Bancroft stated that he accepted the plea

because counsel advised him that he would get less than the mandatory minimum at sentencing. That fact alone does not rise to the level of ineffective assistance of counsel, for defendant was given an opportunity during the plea colloquy to state whether any promises were offered as a part of the plea agreement and he answered "No." See Plea Hr'g Tr. at 9-10 (doc. no. 58). In United States v. Ritter, 93 Fed. Appx. 402 (3d Cir. 2004), the Third Circuit held that a § 2255 petitioner was not entitled to relief from his sentence based on a claim that his counsel promised he would get no more than five years in prison. There, the court stated "[w]hatever counsel had told Ritter, clearly there was no prejudice because Ritter was fully advised at the time of the taking of the plea that the District Court was not a party to an agreement or promise of any kind," and therefore need not comply with any sentencing bargains between counsel. See id. at 405. Even if counsel had advised Bancroft that he would get less than the mandatory minimum, that fact was not set forth during the plea hearing and Bancroft again stated that he was not coerced into pleading guilty and he had no other agreement with the government other than that which was stated on the record. See Plea Hr'g Tr. at 21 (doc. no. 58). In addition, Bancroft's lawyer specifically stated on the record at sentencing, in response to Your Honor's questioning, that he was not suggesting that Bancroft entered into this agreement "thinking that ten

years was the max and that the government is breaching this agreement" by asking for a heavier sentence. See Sentencing Tr. at 26 (doc. no. 59).

Finally, failure to object to discrepancies in the PSI is not ineffective assistance of counsel per se. See Padilla v. United States, No. 90-276, 1996 U.S. Dist. LEXIS 14328, at *5-8 (E.D. Pa. Oct. 1, 1996) (in a § 2255 petition, the court held that counsel's failure to object to errors in the PSI was not error because counsel noted those errors in open court and defendant could not identify how the alleged constitutional violation would result in a miscarriage of justice). Bancroft is still required to show that but for the failure to object to the PSI, the results of the sentencing would have been different. Bancroft does not identify the errors in the PSI of which he complains, nor does he explain any effect they may have had on sentencing.

C. Application of Blakely v. Washington.

Bancroft argues that this Court unlawfully enhanced his sentence based upon factors not found by a jury beyond a reasonable doubt based on the Supreme Court's decision in Blakely, which held that any factor that increases the penalty for a crime beyond the statutory maximum must be presented to a jury and determined beyond a reasonable doubt. See Blakely, 124 S.Ct. at 2536 (citing Apprendi v. New Jersey, 530 U.S. 466

(2000)). The Third Circuit held in Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005), that a § 2255 petition arguing that a sentence was imposed in violation of Blakely is governed by the Supreme Court's intervening decision in United States v. Booker, 125 S.Ct. 738 (2005), which concluded that Blakely applies to the Federal Sentencing Guidelines. As in Lloyd, therefore, Bancroft's § 2255 petition to vacate, set aside or correct his sentence in light of Blakely is governed by the Third Circuit's Booker analysis. See Lloyd, 407 F.3d at 611.

Booker, the court held in Lloyd, is not retroactive according to the three prong test set forth by the Supreme Court in Teague v. Lane, 489 U.S. 288, 310 (1989). That inquiry includes (1) whether the conviction became final before the decision in Booker;[2] (2) whether the rule announced in Booker is

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[2]The Third Circuit elaborated on this Blakely-Booker continuum in a footnote of the Lloyd opinion. See Lloyd, 407 F.3d at 611 n.1. The Court stated:

> We note in passing that some courts, when considering the issues now before us, refer to the "Blakely rule" and others refer to the "Booker rule." We believe it is appropriate to refer to the "Booker rule." It is the date on which Booker issued, rather than the date on which Blakely issued, that is the appropriate dividing line." Blakely, as the Court of Appeals for the Seventh Circuit pointed out, reserved decision about the status of the Federal Sentencing Guidelines, and Booker established a new rule for the federal system.

Id. (citations omitted). Because Blakely was issued on June 24, 2004, Bancroft's conviction was still final as of the dates of both relevant opinions.

"new;" and (3) whether an exception for "watershed [rules] of criminal procedure" applies. See Lloyd, 407 F.3d at 611-612. First, Bancroft's conviction became final before January 12, 2005, the date the Supreme Court issued Booker. On August 5, 2003, the Third Circuit affirmed Bancroft's sentence and on December 8, 2003 the Supreme Court denied certiorari to Bancroft's direct appeal. As for the second and third prongs of the Teague inquiry, the Third Circuit determined that the rule announced in Booker is "new" and "procedural," but not "watershed." Therefore, Booker--and by extension Blakely--"does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005." See id. at 615-16; see also United States v. Cherynak, No. 04-4243, 2005 U.S. Dist. LEXIS 16799, at *7 (E.D. Pa. Aug. 15, 2003) (following Lloyd to hold that "Defendant cannot claim that his plea was 'constitutionally invalid' based upon Blakely and Booker").

III. CONCLUSION

Bancroft's § 2255 motion requesting this Court to vacate, set aside or correct his sentence should be denied. Bancroft's argument that the government breached the plea agreement by failing to support its own § 3553(e) motion for a downward departure was already decided on direct appeal by the

Third Circuit in the government's favor and is not an appropriate issue for collateral attack. Bancroft's ineffective assistance of counsel argument does not show that the result of the plea, i.e. Bancroft may not have pleaded guilty, would have been different but for counsel's conduct. Finally, Bancroft's argument that his sentence is unconstitutional following the Supreme Court's decision in Blakely is wrong because Blakely does not apply retroactively to convictions that became final prior to the Court's decision in Booker.

An appropriate order follows.

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	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

ORDER

AND NOW, this **1st** day of **November, 2005**, upon consideration of the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, it is hereby **ORDERED** that the petition is **DENIED.**

IT IS FURTHER ORDERED that the case shall be marked **CLOSED.**

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.